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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KANNETH RAY BROWN,

Defendant and Appellant.

E065708

(Super.Ct.No. FMB1100593)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

Kevin Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Kanneth Ray Brown appeals from the superior court's denial of his petition for resentencing under Proposition 47. We affirm.

FACTS AND PROCEDURE

On November 2, 2011, a sheriff's deputy preparing to move defendant and other inmates from a holding cell to a courtroom found a baggie inside defendant's left sock. The baggie was found to contain methamphetamine. Defendant claimed one of the other inmates gave it to him to hold.

On November 15, 2011, the People filed a felony complaint alleging defendant possessed a controlled substance in a jail (Pen. Code, § 4573.6)¹ and possessed a controlled substance (Health & Saf. Code, § 11377, subd. (a)). The People also alleged defendant was previously convicted of a "strike" felony (§§ 1170.12, subds. (a)-(d) and 667, subds. (b)-(i)), attempted murder (§§ 664/187), on October 4, 2011.

On November 17, 2011, defendant pled guilty to possessing a controlled substance in jail in exchange for dismissal of the other possession count and the prior strike allegation. Also on that date, the court sentenced defendant to five years in prison for the attempted murder of which he had been convicted on October 4, in case No. FMB1100334. The court also sentenced defendant to one year in prison for possessing a controlled substance in jail, to be served consecutive to the attempted murder sentence.

On November 4, 2014, voters enacted Proposition 47, and it went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies

¹ Section references are to the Penal Code except where otherwise indicated.

or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) “Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47.” (*Id.* at p. 1092; see § 1170.18, subd. (a).)

On January 2, 2015, defendant filed a petition for resentencing under section 1170.18, subdivision (a), seeking to have his conviction for possessing a controlled substance in jail reduced to a misdemeanor. The People responded on January 13, 2015 that defendant is ineligible for resentencing for two reasons: Brown is ineligible because he was convicted of attempted murder, and section 4573.6 is not eligible for reduction to a misdemeanor under section 1170.18. On January 30, 2015, the superior court denied defendant’s petition for resentencing because he “does not satisfy the criteria in Penal Code 1170.18 and is not eligible for resentencing.” On February 6, 2015, defendant filed the same petition again. The record contains a response from the People explaining that the court had already denied the petition on January 30, 2015.

This appeal followed.

DISCUSSION

Upon defendant’s appeal, this court appointed counsel to represent him. Counsel has filed a brief under authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v.*

California (1967) 386 U.S. 738, setting forth a brief statement of the case, a summary of the facts and potential arguable issues and requesting this court undertake an independent review of the record. We have also afforded defendant the opportunity to file a personal supplemental brief, which he has done.

Defendant first argues that his exclusion from the benefits of Proposition 47 violates his right to equal protection of the law under both the state and federal constitutions. Specifically, defendant contends “there are other similar offenders who have been granted relief that have committed serious and violent offenses, even ‘Strikes.’” Defendant attaches to his supplemental brief two appendices, which he says show that other defendants with prior convictions for second degree robbery had their Proposition 47 petitions granted.

Appendix “A” purports to include a photocopy of a Proposition 47 form petition filed by a person named Alfred Villarreal. In the section denoted “District Attorney’s Response,” the box indicating the People do not oppose the petition is checked, with the handwritten notation “The PC 487 and 487.1 convictions only.” At the bottom of the petition is a handwritten notation “Court grants reduction as to PC 487 and [illegible].” The second document in Exhibit “A” purports to be a copy of a “Los Angeles County Probation Department, Pretrial Services Division, Defendant Criminal Record History” for Alfred Villareal, prepared 05/10/2011. The document shows a 1995 conviction for second degree robbery (§ 211).

Appendix “B” consists of a single sheet of paper purporting to be a copy of Form No. PL-CR005 from Placerville County Superior Court, in which the district attorney checked the boxes indicating it does not object to the defendant, Jose Humberto Magana-Torres, being resentenced under section 1170.18 “As to Counts 19, 20 & 21,” but that the specified offenses are ineligible under that section “As to Counts 1, 2, 7 and 18.”

We deny the request for judicial notice as to Appendix “B” because it is not relevant to defendant’s Equal Protection argument, as it does not show that a similarly situated defendant received different treatment. We deny the request for judicial notice as to Appendix “A” because, to the extent the documents are relevant at all to this appeal, they are not authenticated.

For defendant’s purposes, the fact remains that a prior conviction for second degree robbery, as defendant has, makes a defendant categorically ineligible for resentencing under Proposition 47. (§ 1170.18, subd. (i).)

Defendant’s second argument in his supplemental brief asks this court to appoint him legal counsel to more fully develop his equal protection argument. However, this Court has already appointed appellate counsel according to the procedures of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, and we do not find it necessary to have additional briefing on the equal protection issue defendant raises in his supplemental briefing. (*Smith v. Robbins* (2000) 528 U.S. 259, 266)

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the entire record and find no arguable issues.

DISPOSITION

The order denying defendant's petition under section 1170.18 is affirmed.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

McKINSTER

J.